(4)

Supreme Court, U.S.
FILED
JUN 22 2001
OFFICE OF THE CLERK

No. 00-1563

# *In the Supreme Court of the United States*

Beverly California Corp.,

*Petitioner*,

v.

National Labor Relations Board,

*Respondent*.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

## REPLY TO OPPOSITION

Warren M. Davison
*Counsel of Record*
Thomas P. Dowd
LITTLER MENDELSON
401 East Pratt Street
Suite 1653
Baltimore, Maryland 21202
(410) 528-9545

Counsel for Petitioner

10pp

## TABLE OF CONTENTS

I THE WORD LIMITATION ISSUE WARRANTS REVIEW BY THIS COURT ..... 1

II. THE COURT OF APPEALS' ENFORCEMENT OF THE BOARD'S CORPORATE-WIDE ORDER IS RIPE FOR REVIEW ..... 5

III. CONCLUSION ..... 8

## TABLE OF AUTHORITES

**Page(s)**

### CASES

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) ..... 6
Abood v. Detroit Board of Education,
431 U.S. 209 (1977) ..... 6
Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.,
389 U.S. 327 (1967) ..... 6
Duquesne Light Co. v. Barasch,
488 U.S. 299 (1989) ..... 6
Pacific Gas and Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n,
461 U.S. 190 (1983) ..... 6

### STATUTES

28 U.S.C. § 2072 ..... 1, 5
National Labor Relations Act,
29 U.S.C. § 160(c) ..... 6
29 U.S.C. § 160(f) ..... 2, 3, 4

### RULES

F.R. App. P 32(a)(7) ..... 1

## I.

## THE WORD LIMITATION ISSUE WARRANTS REVIEW BY THIS COURT

The Board's brief does not challenge the ripeness of the word limitation issue raised in the Petition, but the Board's brief characterizes that issue as not raising "any issue of recurring importance". (Op. Cert. 18). This is plainly wrong. Appellate courts are regularly called upon to determine whether the complexity of a case requires them to exercise their discretion to increase the word limitations set forth in F.R. App. P. 32(a)(7). While those judges face legitimate concerns about the difficulty of processing an increasing number of cases through an already overworked federal court system, it is important for this Court to establish that these legitimate pressures will not justify briefing limitations that undeniably abridge a party's substantive statutory and constitutional rights in contravention of 28 U.S.C. § 2072.

We submit that this Court is unlikely to ever be presented with a clearer example of the danger and harm that can result when judicial expediency tempts appellate judges to limit briefing space as a means of limiting the issues a party may raise on appeal. Beverly petitioned the court of appeals to review 42 of 76 unfair labor practice findings in the underlying cases, but Beverly was required to challenge those 42 unfair labor practice findings in the space of only 25 pages -- roughly one-half of a page in which to: (1) summarize relevant facts; (2) identify applicable legal precedents and explain their application; and (3) develop compelling supporting arguments. It obviously was impossible to do this, and the effect of the court's word limitation was to deny Beverly its statutory

right to obtain meaningful review under 29 U.S.C. § 160(f).[1]

It is particularly inappropriate for the Board's Brief to defend the court of appeals' word limitation on the ground that "the court of appeals also had access to the entire record." (Op. Cert. 17). First, "the entire record" consists of more than 14,000 transcript pages and more than 4,000 exhibits (App. J, K). It is disingenuous for the Board to imply that the Court of Appeals realistically would search the record on its own to assess whether substantial evidence supported the 42 challenged findings in the 140 pages that make up the Board's decision in this consolidated proceeding and to imply that such a search is an adequate substitute for focused briefing by the petitioning party.

Second, the Board knows very well that the burden of the Court of Appeals' word limitation did not fall equally on Beverly and the Board. The Board's two underlying decisions effectively constituted a 140 page brief

---

[1] The Board's Brief (Op. Cert. 17) criticizes the Petition for failing to demonstrate that additional briefing space would have transformed a losing argument into a winning argument on specific unfair labor practice findings, and the Board's brief simultaneously characterizes the word limitation issue as being "entirely fact-based" (Id.). Each criticism is unfounded. This Court has ample experience from its own NLRA-related cases to understand -- without any allegation-by-allegation inquiry -- that one-half of a page is not adequate space to summarize relevant facts, identify applicable precedent and set forth compelling arguments for overturning a lengthy Board decision. If the Petition for Writ of Certiorari is granted, Beverly can use the subsequent merits brief to identify some examples of the factual and legal errors in the court of appeals' decision that were caused by the improvident word limitation, but such a presentation is not appropriate in a Petition for Writ of Certiorari, which stresses solely the need for Supreme Court review of the court of appeals' actions.

thoroughly setting forth the Board's view as to what evidence and legal authorities supported its decision. The Board's Brief to the Court of Appeals could -- and frequently did -- simply cite to and adopt the lengthy versions of facts and arguments contained in the Board's decision, whereas Beverly did not have that luxury and was required to forego entire legal arguments and descriptions of factual discrepancies in order to fit its position within the word limitation.

One of the primary reasons that this Court should grant the Petition in this case is that this prejudicial denial of Beverly's statutory right of appellate review is a direct and intentional result of the Board's litigation strategy which stockpiled[2] five years worth of separate cases into a single proceeding (Pet. 6-7). By doing this, the Board created a consolidated proceeding that was 32 times larger than the type of ordinary Board proceeding contemplated in 29 U.S.C. § 160(f). It was the court of appeals' obligation to recognize that this 3,200% increase in the size of the proceeding required more than the 40% increase in briefing space granted by the court of appeals in this case.

Beverly will never be able to adequately impress upon this Court the level of deep frustration and sense of helplessness that results from being denied the opportunity for meaningful appellate review of the two underlying decisions. Beverly knew very well that the Board's issuance of a corporate-wide order in the underlying cases was inevitable -- not because such an order was merited but because the Board's General Counsel had committed substantial resources, both in terms of money and personnel, to the consolidation and prosecution

---

[2] The characterization of these case having been "stockpiled" is an observation made by the Board's own administrative law judge (App. G at 593a). It has never been denied by the Board.

of this litigation, and the General Counsel had done so largely at the expense of the individual employees who, instead of having their disputes resolved expeditiously through the Board's regular processes, were required to wait, in some cases more than ten years, for final relief. There was simply no possibility that this collective investment would be declared by the Board to be "all for naught" through a decision in Beverly II and Beverly III denying a corporate-wide order. Moreover, Beverly knew that the Board would need to find as many unfair labor practices as it could in these two cases in order to provide a factual basis to support a corporate-wide order, which meant that the evidence and legal authorities related to particular unfair labor practice findings would be stretched as far as possible to support as many unfair labor practice findings as possible.

Beverly could accept this unpalatable reality because it knew that the Board's findings and conclusions would be subject to neutral appellate review -- as contemplated by 29 U.S.C. § 160(f) -- at which point Beverly would have the opportunity to demonstrate the lack of substantial evidence supporting the various findings.[3] The court of appeals' word limitation, however, denied Beverly that opportunity. In doing so, the court of appeals

---

[3] Beverly had faced this same sense of inevitability in the Beverly I consolidated litigation, but similarly had taken comfort in the knowledge that the Board's anticipated order would be subject to court of appeals review. Beverly's faith in the process was rewarded when the Court of Appeals for the Second Circuit, after granting adequate briefing space, denied the corporate-wide order because, among other reasons, the court recognized the Board's inclination to find against Beverly if any version of the facts permitted it to do so. "Moreover, the proof in many cases, while sufficient to support the decision, was ambiguous, and contrary decisions would have been as sustainable." (App. G at 623a-624a).

simultaneously denied Beverly the statutory protection provided by 29 U.S.C. § 160(f) and deprived Beverly of the recognized property interest that every citizen possesses entitling that citizen to meaningful access to the court system under the Due Process Clause of the Fifth Amendment. (See Pet. 11-15). The court of appeals' actions are especially upsetting to Beverly because the court of appeals, having first prevented Beverly from presenting supporting facts and argument, then went on to characterize numerous Board findings as being "close calls" that the Court enforced solely because "close calls go to the Board". (App. A at 44a). See also examples at Pet. 13-14, n.5.

This Court promulgated and implemented the Federal Rules of Appellate Procedure under the authority of 28 U.S.C. § 2072, but that statutory authority contains a specific caveat that "[s]uch rules shall not abridge, enlarge or modify any substantive right." If this caveat is to have any meaning, then this Court needs to grant the Petition for Review and exercise its supervisory authority over the courts of appeals in order to prevent a Federal Rule of Appellate Procedure from being used in a manner that deprives a party of its statutory and Constitutional right to obtain appellate review of an agency order.

## II.

## THE COURT OF APPEALS' ENFORCEMENT OF THE BOARD'S CORPORATE-WIDE ORDER IS RIPE FOR REVIEW

The Board's Brief incorrectly asserts that the "corporate-wide order" issue is not ripe for review. The Court of Appeals unambiguously concluded that "the Board is entitled to impose corporate-wide relief." (App. A at 49a). It is that precise determination that Beverly is asking this Court to review in the Petition for Writ of Certiorari.

The only aspect of the Board's Order that has been remanded by the Court of Appeals is the ministerial task of redrafting the Order's language regarding the type of violations found by the Board. Id. The Court of Appeals characterized the Order as a "laundry list" of violations that needed to be narrowed (Id.), but the Board's entitlement to issue a corporate-wide order is decided.

The Board's reliance (Op. Cert. 12) on Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) is misplaced. In that case, the court of appeals had not remanded a purely ministerial task. Instead, the court directed the district court to determine whether acts of contempt had occurred and the magnitude of the contumacious conduct. These were the issues that were the basis for the Petition for Writ of Certiorari, and the matter plainly was not ripe.

In cases involving administrative agency determinations, the relevant consideration is whether Supreme Court review would be occurring prior to the administrative agency's policy determination. Pacific Gas and Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 200-201 (1983); Abbott Labs. v. Gardner, 387 U.S. 136, 149-151 (1967). Here, the decision to issue corporate-wide relief has been made and has been enforced, the only remaining task is for certain ministerial changes to be made in the language of particular alleged violations, and this has no impact on whether corporate-wide relief is permissible under Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c). Cf., Abood v. Detroit Board of Education, 431 U.S. 209, 216 n.8 (1977) (no ripeness issue where remand was "only for a ministerial purpose, such as correction of language in the trial court's judgment"); Duquesne Light Co. v. Barasch, 488 U.S. 299, 306-307 (1989) (the final judgment rule is not interpreted strictly where a remand has

occurred but the federal issue in the case has been resolved by the highest available state court).

The remainder of the Board's argument regarding the "corporate-wide order" issue is geared to demonstrating why, in the Board's opinion, its issuance of a corporate-wide order was consistent with applicable precedent. This argument regarding the merits, however, does not demonstrate that review by this Court is improvident. To the contrary, it demonstrates the importance of this legal issue for the increasing number of employers throughout the United States who operate from more than one location and face the risk of having the Board extend the terms of its orders beyond the locations where unfair labor practices are found to have occurred.

The one thing that is noteworthy about the Board's Brief in this regard is the utter absence of any argument by the Board addressing the important distinction between the Board's authority to issue a cease-and-desist order, which is analyzed under a "necessary to prevent future unfair labor practices" standard (Pet. 24), versus an affirmative action order such as the notice-posting requirement in this case, which is analyzed under a much more stringent standard allowing affirmative action only to the extent necessary to expunge the effects of unfair labor practices that have occurred (Pet. 16-17). The Board's notice-posting requirement is an affirmative action remedy that is unjustifiable given the undisputed fact that the unfair labor practices at particular facilities in this case had no impact beyond the individual facilities where the unfair labor practice occurred.

The Board's Brief glosses over the important distinction between "affirmative action" relief and "cease-and-desist" relief, characterizing a corporate-wide notice-posting provision as merely something that "complements a corporate-wide cease-and-desist order." (Op. Cert. 17). The Court of Appeals uncritically did the

same. A Writ of Certiorari is necessary in order to emphasize the distinction between the two forms of relief, and this case provides an ideal vehicle for clarifying that distinction in the unprecedented context of a nationwide remedial order.

## III.

## CONCLUSION

For each of the foregoing reasons, Petitioner respectfully submits the Writ should be granted.

Respectfully submitted,

/s/

Warren M. Davison
Thomas P. Dowd
LITTLER MENDELSON
401 East Pratt Street
Suite 1653
Baltimore, Maryland 21202
(410) 528-9545

Dated: June 22, 2001